No. 85-701

IN THE Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL ELECTION COMMISSION,
APPELLANT,
v.
MASSACHUSETTS CITIZENS FOR LIFE, INC.,
APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE CIVIL LIBERTIES UNION OF MASSACHUSETTS.

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Federal Election Commission
Appellant,

v.

Massachusetts Citizens for Life, Inc.
Appellee,

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BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE CIVIL LIBERTIES UNION OF MASSACHUSETTS IN SUPPORT OF APPELLEE MASSACHUSETTS CITIZENS FOR LIFE

INTEREST OF THE AMICI

The American Civil Liberties Union, Inc. (ACLU) is a non-profit corporation with approximately 250,000 members nationwide. For over 60 years, it has devoted itself to defending the civil rights and liberties guaranteed by the United States Constitution. The Civil Liberties Union of Massachusetts (CLUM) is a state affiliate of the ACLU.

CLUM and ACLU throughout their history have been primarily concerned with defending the related First Amendment rights of political speech and association. Both organizations have provided direct representation or participated as amicus curiae in numerous cases before this Court, as well as state and lower federal courts, involving these most fundamental of constitutional rights.

CLUM and ACLU also have a specific institutional interest in this case because the interpretation of federal election law urged by the Federal Election Commission (FEC), affects all advocacy organizations, including ACLU, which publish and rate the voting records of legislators. See the affidavit of CLUM Executive Director

John Roberts, J.A. 182-84.[1] This form of political communication is crucial in a democracy, and poses no threat to any public interest that would justify prohibition or burdensome regulation.

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[1]J.A refers to the Joint Appendix; J.S.A to the Jurisdictional Statement Appendix; and S.A. to the Supplemental Appendix filed by Massachusetts Citizens for Life (MCFL).

The affidavit of John Roberts demonstrates that both ACLU (which is incorporated) and CLUM (which is not) regularly publish and rate, with a plus or minus sign, the voting records of legislators on key civil liberties issues, particularly during election years when voter interest is at its height. Consistent with ACLU bylaws, neither organization may endorse candidates for political office or establish political committees within the meaning of the Federal Election Campaign Act. J.A. 183-84, ¶¶5-6; 37-38, ¶19 (findings by federal district court in FEC v. Central L.I. TRIM, 616 F.2d 45 (2d Cir. 1980), which were made part of the record in the present case).

STATEMENT OF THE CASE

A. Facts and Proceedings

MCFL is a nonprofit corporation whose sole purpose is to oppose the constitutional right of a pregnant woman to choose abortion (J.A. 83-84, 93). Through a variety of political activities, including publication of its newsletter, MCFL has sought to persuade the public and its elected representatives to oppose the right to reproductive choice and to outlaw abortion (J.A. 85-87).

The MCFL newsletter has been published regularly since 1973, finances permitting (J.A. 88). Since the second edition in April 1973, the MCFL newsletter periodically informed its readers of the positions taken or votes cast by legislators on abortion-related

issues, often but not always in the form of special election editions. For example, regular editions of the newsletter frequently reported legislators' positions or voting records, and commended some votes, while noting that MCFL endorses no candidate in particular (S.A. B: 1b, p.4; 1c, p. 5; 2a, pp. 4-5; 2b, p. 2; 3e, pp. 1-3; 3f, p. 2; 3g, p. 4; 3h, p. 3; 4e, p. 1; 4g, pp. 1-4; 5b, pp. 1-3; 5c, pp. 2-3; 5d, pp. 2-3; 6a, p. 5; 6b, p. 4). Special election editions in 1973 through 1978 urged readers to vote "pro-life," reported legislators' records in tabulated form, and advised that MCFL did not endorse any candidate or party (S.A. B: 2c, 2e, 4a, 4f, 4h, 5e, 6c, 6e).

In July 1979 the FEC notified MCFL that it was investigating possible

violations of various sections of the federal election law in connection with the publication of the September 1978 newletter (S.A. B: 6c; Record at 326-27). In March 1982 the FEC filed a complaint against MCFL in federal district court, alleging that the September 1978 edition of the newsletter violated 2 U.S.C. §441b(a) (J.A. 1). The District Court entered summary judgment for MCFL, ruling that the newsletter was not covered by §441b; the Court of Appeals affirmed, holding that the newsletter was covered, but that §441b was unconstitutional as applied to this type of issue advocacy.

The September 1978 MCFL newsletter carried the headline "Everything You Need to Know to Vote Pro-Life" (S.A. B: 6c, p. 1). The inside pages provided voting record information on those

candidates in primary elections for United States Senate and House of Representatives, Massachusetts Senate and House, and Governor, who had served in elective office (id. at 2-8). Where the candidate had not previously held elective office and so had no voting record, or had not answered MCFL's questionnaire, the absence of relevant information was also noted. The back page again urged a "pro-life" vote and stated, "This special election edition does not represent an endorsement of any particular candidate" (id. at 8).

The MCFL special election edition resembled in substantive content, if not in tone and style, the communications of other nonprofit advocacy corporations regarding legislators' and candidates' positions on political issues. Judge Pratt in the TRIM case, for example,

found that the U.S. Chamber of Commerce, Inc., the United Church of Christ, and Public Citizen, Inc. make it a practice to publicize, explain, and praise or criticize legislative votes in efforts to inform the electorate and make legislators accountable to it (J.A. 42-53).[2] The United Church of Christ views its publication as part of its religious ministry (J.A. 48, ¶17).

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[2] The Chamber of Commerce's activity apparently ceased in 1978 after the FEC issued an Advisory Opinion that distribution of its publication, "How They Voted," to the public or local chamber affiliates would violate §441b "since the publication was prepared at the expense of the Chamber which is itself incorporated..." Dissenting, Commissioner Aikens wrote that the Commission's opinion effectively "insulat[ed] elective representatives from the sometimes uncomfortable experience of having their positions on issues, as manifested by their votes in Congress, compared to the positions of various public organizations" (J.A. 42-43, ¶¶4, 5).

Public Citizen has published a Voting Index and well as "profiles" of selected members of Congress evaluating their performance (J.A. 49-53). Americans for Democratic Action, Americans for Constitutional Action, and the American Conservative Union also rate legislators on key issues (J.A. 53-54).

The importance of rating and publicizing legislators' votes was explained in the TRIM case by Reverend Barry Lynn of the United Church of Christ:

> Some [legislative] decisions are very complicated. Motions are hidden in huge appropriation bills. The most important thing in a bill might be an amendment to the bill that never gets reported at all in the newspapers. If [our members] are going to be informed people making issue-decisions, then I think they need publications like this; and many of our members are not members of the National Taxpayers Union, or the ACLU, or Common Cause, or anybody else. This is the way that they get information on public policy issues,

> and this is the way that get information on the votes taken by members of the Congress, so that they can have healthy dialogue at any time of the year that they have a chance to talk to their elected officials.

J.A. 48-49, ¶18.

B. Historical Background

It is important in understanding the issues here to review the FEC's position as it has evolved in these proceedings as well as in prior attempts over the past fourteen years to regulate or prohibit political advocacy. In this case the Commission argued to the lower courts that MCFL's communications were prohibited by 2 U.S.C. §441b regardless of whether they constituted "express advocacy" of the election or defeat of any candidate. See FEC Brief to U.S. Court of Appeals, 15-21. The Commission urged in the alternative that the MCFL

newletter was express advocacy because it did not disseminate candidates' positions "in a non-partisan fashion." Id. at 16.

The District Court rejected the FEC's argument that the MCFL newsletter constituted express advocacy. The Court of Appeals accepted the argument, but held that §441b still could not constitutionally be applied to MCFL's communications.

Responding to the Court of Appeals' invalidation of 2 U.S.C. §441b insofar as it applied to nonprofit issue advocacy corporations like MCFL, the FEC now urges this Court to reverse on two grounds: first, that applying §441b to the MCFL newletter does not offend the First Amendment; and second, that even if exempted from §441b, MCFL would still be subject to federal regulation as a

"political committee" under 2 U.S.C. §431(4)(A). Brief at 25-26. In making this latter claim the Commission does nothing to overcome the constitutional impediments to prohibition or regulation of the type of informative advocacy involved here, and it revives a line of argument that has been consistently rejected by federal courts over the last fourteen years.

In the first suit brought under the new FECA of 1971, the FEC argued that an organization that paid for an advertisement calling for the impeachment of the President, and praising legislators who advocated impeachment, was a political committee within the meaning of the statute, because the ad was a partisan communication "for the purpose of influencing the outcome of the 1972

election." The Commission asked the court to enjoin the committee from receiving funds or making expenditures unless it complied with the filing and reporting requirements of the Act. U.S. v. National Committee for Impeachment, 469 F.2d 1135 (2nd Cir. 1972).

The Court of Appeals rejected the government's arguments as promoting the "abhorrent" and "intolerable" consequence of "regulating the expression of opinion on fundamental issues of the day." Id. at 1142. The court insisted that a "political committee" must have as its major purpose the nomination or election of a candidate. Id. at 1141.

In ACLU v. Jennings, 366 F.Supp. 1041 (D.D.C. 1973), vacated as moot sub nom. Staats v. ACLU, 422 U.S. 1030 (1975), the Commission again took the position that advocacy groups were subject to

election law regulation when they published an advertisement listing 102 Congressmen in an "honor roll" and derogating the Nixon Administration's opposition to court-ordered busing. The court rejected the FEC's position, reminding the agency that "[a]ny attempt to restrict the free and unfettered dissemination of such opinions cannot be favorably viewed," id. at 1051, and concurring in the Second Circuit's definition of "political committee" in National Committee for Impeachment. Id. at 1057.

Congress then amended the Act by adding §437a, which stretched reporting and disclosure requirements to cover speech by nonpartisan groups "designed" to influence an election by "setting forth the candidate's position on any public issue, his voting record, or

other official acts." This new section bore uncanny resemblance to the FEC's current construction of 441b. It was soon held unconstitutional because unnecessarily infringing on First Amendment rights of speech and political association. Buckley v. Valeo, 519 F.2d 821, 869-78 (D.C. Cir. 1975), affirmed in part and reversed in part on other issues, 424 U.S. 1 (1976). In language directly applicable to the present case, Judge Tamm, concurring, wrote:

> Under this section, plaintiff American Civil Liberties Union must disclose its contributors and expenditures since it publishes a membership newsletter with voting records on civil liberties issues....Under this section a similar requirement would be placed on a Right-to-Life group who places a newspaper advertisement calling for the election of all candidates who support an anti-abortion constitutional amendment.
>
> I can hardly imagine a more sweeping abridgement of first amendment associational rights. Section 437a

> creates a situation whereby a group contributes to the political dialog in this country only at the severest cost to their associational liberties. I can conceive of no governmental interest that requires such sweeping disclosure of all groups who take a stand on a public issue or report voting records...

519 F.2d at 914 (emphasis added).

The FEC did not appeal this Court of Appeals ruling, although the Supreme Court reviewed other questions raised in Buckley; and §437a was later repealed.

It might have been thought that the Buckley decisions and Congressional repeal of §437a conclusively disposed of the argument advanced here by the FEC, that organizations whose only connection with the electoral process is independent discussion and issue advocacy may be subjected to government controls under the FECA, and prohibited from speaking entirely if they do not submit. However, in FEC v. APSCME, 471

F.Supp. 315 (D.D.C. 1979), the Commission sued a union which had circulated a "Nixon-Ford" poster in 1976, alleging violation of the disclosure requirements of what was then 2 U.S.C. §431(f)(4)(C). Adopting this Court's interpretation in Buckley of then-§434(e), the district court held that to fall within the regulated zone, the communication must not "be 'primarily devoted to subjects other than the express advocacy of the election or defeat' of a clearly identified candidate." Id. at 316. Although the poster "may have tended to influence voting," it contained "communication on a public issue widely debated during the campaign" (President Ford's pardon of former President Nixon), and thus "is the type of political speech which is protected from

regulation." Id. at 317.

Finally, in FEC v. Central Long Island TRIM, supra, 616 F.2d 45, the FEC sued a tax reform committee that published pamphlets setting out a local Congressman's record on tax and spending issues. The Commission argued that the pamphlets were not produced for the purpose of informing the public about the voting record of a government official, but were intended to unseat "big spenders," and were therefore subject to regulation. Id. at 53. The court noted that the FEC's interpretation would broaden sections 434(e) and 441d, from regulation of expenditures "expressly advocating" election or defeat, to government oversight of all communications made "for the purpose, express or implied, of encouraging election or defeat." Id.

(emphasis in original). The court rejected this position as "totally meritless." Id. Chief Judge Kaufman, concurring, added:

> [T]he insensitivity to First Amendment values displayed by the Federal Election Commission...in proceeding against these defendants compels me to add a few words about what I perceive to be the disturbing legacy of the Federal Election Campaign Act....
>
> It is disturbing because citizens of this nation should not be required to account to this court for engaging in debate of political issues....The First Amendment presupposes that free expression, without government regulation, is the best method of fostering an informed electorate.... Thus, courts have consistently struck down not only government attempts to restrain or punish expression, but also government regulation of speech designed to make information available to the public.

616 F.2d at 53-54 (emphasis in original).

SUMMARY OF ARGUMENT

Although the District Court and the Court of Appeals followed different paths, they reached the same necessary

result: 2 U.S.C. §441b cannot constitutionally be applied to the communications at issue in this case. Both courts recognized that the FEC's attempt to ban the newsletter unless MCFL subjected itself to detailed regulation by establishing a "segregated fund" struck at the very core of the First Amendment.

Before this Court, the FEC continues to ignore the magnitude of the constitutional right involved here. Communicating with the voting public about the views and actions of its elected representatives on political issues of pressing national concern is certainly among the most fundamental rights in a democracy, and associating together, whether in corporate form or otherwise, to amplify such communications is equally entitled to

the highest level of constitutional protection.

The FEC contends that §441b does not prohibit political speech but only commands that it flow from a separate "segregated fund." It then attempts to minimize the burdens that the regulatory scheme imposes on such funds. But the facts of this and prior election law cases, and the requirements of the statute itself, suggest otherwise. Applying §441b will silence political speech entirely in many instances, while unduly and unnecessarily burdening its exercise in others.

As the Court of Appeals correctly observed, the FEC has pointed to no compelling governmental interest justifying the application of §441b in this case. Neither corruption nor the fear that members' contributions will be

misspent constitutes a realistic danger in this context. Thus, the First Amendment demands that the advocacy at issue here remain free.[3]

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS THE PUBLICATION AND EVALUATION OF LEGISLATORS' VOTING RECORDS, AND GOVERNMENT MAY NEITHER PROHIBIT SUCH PUBLICATION NOT SUBJECT THE PUBLISHERS TO DETAILED AND BURDENSOME REGULATION.

The FEC contends that 2 U.S.C. §441b prohibits MCFL and similar organizations from publishing materials such as appear in the newsletter unless they form separate segregated funds and submit to

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[3]By confining this brief to the constitutional issues, amici do not mean to suggest that 2 U.S.C. §441b is not capable of a limiting construction, as urged by MCFL and adopted by the District Court.

detailed reporting and disclosure requirements. The agency argues both that the Court ought to evaluate the constitutional rights at issue here by a deferential standard (Brief at 19-20), and that the regulatory requirements imposed by the Federal Election Campaign Act are minimal (Brief at 20-28). The FEC is wrong on both counts.

A. Publication and Evaluation of Legislators' Voting Records is Political Speech Entitled to the Most Rigorous Constitutional Protection.

The political advocacy at issue here merits the most stringent constitutional protection. "[F]ree public discussion of the stewardship of public officials" is a "fundamental principle of the American form of government." New York Times Co. v. Sullivan, 376 U.S. 254, 275 (1964). As this Court has repeatedly observed, "[d]iscussion of public issues

and debate on the qualifications of candidates are integral to the operation" of the American constitutional system, Buckley v. Valeo, 424 U.S. 1, 14 (1976), and have "always rested on the highest rung of the hierarchy of First Amendment values." Carey v. Brown, 447 U.S. 455, 467 (1980).

This pivotal right in our constitutional system applies with equal force to individuals and to advocacy organizations that are formed to amplify the voices of their members. Federal Election Comm'n v. National Conservative Political Action Comm., 105 S.Ct. 1459, 1467 (1985)(NCPAC); Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 295-96 (1981); Buckley v. Valeo, supra, 424 U.S. at 15, 22; NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460

(1958). "'Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.'" NAACP v. Claiborne Hardware 458 U.S. 886, 908 (1982), quoting NAACP v. Alabama, supra, 357 U.S. at 460.

Establishment of an advocacy organization in corporate form in no way diminishes the level of constitutional solicitude with which the organization's political speech must be viewed. Indeed, the NAACP, a party in many landmark decisions recognizing the First Amendment right of association, is a New York membership corporation. See Claiborne Hardware, supra, 458 U.S. at

889. Corporate status alone does not reduce either the "inherent worth" or the constitutional importance of political speech "indispensable to decisionmaking in a democracy." First National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978). See also Pacific Gas & Electric Co. v. Public Utilities Comm'n, 106 S.Ct. 903, 907 (1986).

The FEC thus errs when it denigrates the important First Amendment rights at stake here by urging the Court to apply a deferential standard of review to the presumed legislative judgments that all campaign speech, if originating in an incorporated organization, must be subject to a level of regulation which in many cases will amount to a prohibition, and that publication and rating of candidates' voting records constitutes campaign speech. FEC Brief

at 19-20. The FEC's reliance on this Court's decision in Federal Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 207-11 (1982) (NRWC), is equally inappropriate since that case involved a nonprofit corporation's solicitation of contributions on behalf of federal candidates, not its independent expenditure of funds to disseminate information and political advocacy directly to the public. See NCPAC, supra, 105 S.Ct. at 1468, reaffirming this crucial distinction between the First Amendment status of contributions and independent expenditures, as articulated in Buckley, 424 U.S. at 47-48, and California Medical Ass'n v. FEC, 453 U.S. 182, 195 (1981).

B. Forced Reporting and Disclosure on the Level Required by the FECA Unduly Chills and Threatens the First Amendment Rights of Issue-Oriented Advocacy Organizations.

The FEC contends that forcing MCFL and similarly-situated organizations to establish segregated funds or otherwise register as political committees would impose only a minimal burden on First Amendment rights. This argument ignores both the substantial imposition, and offensiveness to free speech, that a system of government licensing, control, and disclosure involves, and the reality that many organizations will curtail their political speech if the Commission's view prevails.

Under 2 U.S.C. §432, all political committees (including segregated funds) must adhere to specific organizational rules and accounting procedures.

Section 433 requires every such committee to register, and file information about its organization and finances, with the FEC.

Section 434 governs reporting and disclosure. Political committees must file reports of receipts and disbursements at specified intervals (§434(a)(1),(4)). The reports must disclose the identity of each person who makes a contribution, loan, or refund of expenditures in an amount above $200 (§434(b)(3)(A),(E),(F), (G)), as well as the amount and recipient of all disbursements, including "independent expenditures" (§434(b)(4)(H)(iii); §434(b)(5)(A), (D),(E)).

This Court first recognized in NAACP v. Alabama that government-mandated disclosure of the identities of members

of advocacy organizations, particularly organizations asserting unpopular viewpoints or defending the interests of minorities, threatens to chill dramatically the exercise of the First Amendment rights of political speech and association. See also Bates v. Little Rock, 361 U.S. 516, 524 (1960) (making public an organization's membership list constitutes "substantial abridgement of associational freedom"); Shelton v. Tucker, 364 U.S. 479, 486 (1960) (noting "pressure" on citizens to avoid organizational ties that might displease employers or public). The Court fully reaffirmed this principle in Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982):

> The Constitution protects against the compelled disclosure of political associations and beliefs. Such disclosures "can seriously infringe on privacy of association and belief

> guaranteed by the First Amendment." Buckley v. Valeo, supra, 424 U.S. at 64..., citing Gibson v. Florida Legislative Comm., 372 U.S. 539..., NAACP v. Button, 371 U.S. 415... "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." NAACP v. Alabama, supra, 357 U.S. at 462... The right to privacy in one's political association and beliefs will yield only to a "subordinating interest of the State [that is] compelling," NAACP v. Alabama, supra, 357 U.S. at 463...(quoting Sweezy v. New Hampshire, 354 U.S. 234, 265...(1957) (concurring opinion)), and then only if there is a "substantial relation between the information sought and [an] overriding and compelling state interest." Gibson v. Florida Legislative Comm., supra, 372 U.S. at 546...

Id. at 91-92.

In the present context, it is not only the reporting to the government of members' identities that chills and burdens the right to engage in political advocacy, and particularly in criticism of public officials. 2 U.S.C. §432

contains additional requirements that organizations register and file extensive financial information in order to exercise First Amendment freedoms, and that they conform organizationally to the statutory rules and acccounting procedures. Applying these requirements to issue advocacy organizations, as urged by the FEC, amounts to a constitutionally impermissible system of licensing. Cf. Freedman v. Maryland, 380 U.S. 51, 58 (1965); Speiser v. Randall, 357 U.S. 513, 520-25 (1958). As this Court very recently noted in the context of an overly burdensome procedural scheme, "'first amendment rights are fragile and can be destroyed by insensitive procedures.'" Chicago Teachers Union, Local No. 1 v. Hudson, 54 U.S.L.W. 4231, 4234 n.12 (March 4, 1986), quoting Monaghan, "First

Amendment Due Process," 83 Harv.L.Rev. 518, 551 (1970).

In many instances, moreover, as in the case of CLUM and ACLU, an organization could not, consistently with its own bylaws, register as a political committee. See affidavit of John Roberts, J.A. 183-84; TRIM Findings, J.A. 37-38; Court of Appeals decision, J.S.A. 21a n.7; Buckley v. Valeo, supra, 519 F.2d at 871. For the ACLU as for many issue-centered organizations, nonpartisanship is a principle that cannot be compromised. See also ACLU v. Jennings, supra, 366 F.Supp. at 1043 n.1.

Other organizations, regardless of their commitment to nonpartisan issue advocacy, will undoubtedly forego political speech rather than subject themselves to governmental reporting,

disclosure, and control, because of their concern for associational privacy or fear of subjecting their members to reprisal. This response, of course, is most likely to occur among unpopular organizations, particularly those representing dissenting or minority views. Cf. Buckley, 424 U.S. at 42-45 (noting chilling effect of broad application of FECA language). But these dissident voices are often the ones that need most urgently to be heard. The FEC's reading of §441b, if upheld, would not only seriously burden speech and make it less free; it would in many cases silence it entirely. Because there is no compelling public interest to be served by such a licensing or regulatory scheme (see section II, infra), application of §441b

to MCFL would be unconstitutional.[4]

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[4]The Commission mistakenly relies upon Regan v. Taxation with Representation, 461 U.S. 540 (1983), for its argument that requiring the creation of a separate regulated entity for political advocacy is constitutionally permissible. Regan, however, concerned qualification for a government subsidy -- tax deductibility -- rather than limitations on the right to speak. If the organization chose not to comply with the regulatory scheme, the penalty would not be prosecution or silence, but only loss of a marginal increment in the extent to which the government subsidized its activity. Id. at 544. Moreover, the requirement of establishing a separate entity for lobbying purposes, in order to preserve the tax subsidy of deductibility of contributions, did not carry with it the burdensome baggage associated with FECA reporting, disclosure, and control. Id. at 544-45 n.6. As the Court noted in Regan (in contrast to the present case), the government "has not infringed any First Amendment rights or regulated any First Amendment activity." Id. at 546 (emphasis added).

C. The Commission's Attempt to Distinquish MCFL's Newsletter From Less Aggressive Issue-Oriented Political Advocacy is not Workable and Would Vest an Intolerable Degree of Discretion in Government Regulators.

The Commission's emphasis on the "vote pro-life" advocacy that accompanied MCFL's publication and evaluation of voting records, Brief at 3-5, is presumably intended to suggest to the Court that MCFL somehow crossed a line between communications that cannot constitutionally be prohibited or regulated and those that can. But the Commission's own practice makes clear that such an attempted distinction is fraught with constitutional difficulty, while its very imprecision would deter political speech as organizationss attempt to "steer far wider of the unlawful zone...than if the boundaries of the forbidden areas were clearly

marked." Speiser v. Randall, supra, 357 U.S. at 526.

In its regulations, for example, the agency views as "partisan" an incorporated organization's publication of voter guides if they "suggest or favor any position on the issue covered." 11 CFR §114.4(b)(5)(C). Similarly, the Commission has issued advisory opinions condemning publication of legislators' voting records by the Chamber of Commerce and United States Defense Committee, because approval or disapproval of the votes was indicated. FEC AO-1978-18, CCH Federal Election Campaign Financing Guide ¶5305 (1978); FEC AO-1984-14, CCH Federal Election Campaign Financing Guide ¶5761 (1984).

The Commission ruled the other way, however, in approving a voter guide published by Right to Life of Greater

Cincinnati, Inc., because, the agency said, the description of voting records in that instance was "issue-oriented and not election- oriented or candidate-oriented." FEC AO-1984-17, CCH Federal Election Campaign Financing Guide ¶5769 (1984).

Distinctions like these are illusory and fail to put advocacy organizations on reasonable notice of what they may or may not publish. Permitting the agency to prosecute an organization engaged in political advocacy on the basis of its perception that such clearly issue-centered productions as the Chamber of Commerce or MCFL newsletter are really candidate-centered, or of factors such as style or tone of presentation, inclusion of photographs or clip-out forms, or exhortations to "vote pro-life," would vest an intolerable

degree of prosecutional discretion in government agents. See, e.g., Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969) (unbridled discretion); Cox v. Louisiana (Cox I), 379 U.S. 536, 557-58 (1965) (same); Village of Shaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980) (chilling effect). See also FEC v. Central L.I. TRIM, supra, 616 F.2d at 52-53; U.S. v. National Comm. for Impeachment, supra, 469 F.2d at 1140-42. The result of such a system, inevitably, is that First Amendment speech and associational rights would be chilled both by too-zealous or unpredictable enforcement, and by understandable timorousness on the part of issue-advocacy groups. Cf. In re Primus, 436 U.S. 413, 432 (1978); Smith v. Goguen, 415 U.S. 566, 573 (1974);

Speiser v. Randall, supra, 357 U.S. at 526. The FEC's efforts to distinguish the MCFL newsletter from other voting record publications are thus unpersuasive and only highlight the constitutional impediments to the agency's proposed enforcement scheme.

II. THE FEC HAS SHOWN NO COMPELLING STATE INTEREST JUSTIFYING ITS PROHIBITION OR BURDENSOME REGULATION OF POLITICAL SPEECH.

This Court has repeatedly emphasized the exacting burden that the government must meet in seeking to justify a restriction on First Amendment freedoms. The restriction must "be demonstrably supported not only by a legitimate state interest but a compelling one," and it must "operate without unnecessarily circumscribing protected expression." Brown v.

Hartlage, 456 U.S. 45, 53-54 (1982). "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." Thomas v. Collins, 323 U.S. 516, 530 (1945).

The justifications offered by the government, moreover, must be scrutinized in each case to determine if the abuse that they are designed to combat is really present, or likely to be present, in the speech that is sought to be restricted or suppressed. Thus, in Brown v. Hartlage, supra, the asserted compelling interest in preventing politically corrupt bargains between candidates and voters was simply not advanced by punishing a candidate who promised the electorate as a whole that he would serve at a reduced salary. 456 U.S. at 55-58. Similarly, in First National Bank v. Bellotti,

supra, the compelling need to avoid corruption or its appearance in candidate elections had no application to issue-oriented referendum campaigns. 435 U.S. at 788 n.26.

The FEC urges that isolated language in this Court's recent NRWC opinion, 459 U.S. at 210 ("[n]or will we second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared"), introduces a more relaxed standard. FEC Brief at 23. But, as noted, the NRWC case involved not core political advocacy but the solicitation of contributions to a segregated fund for the specific purpose of supporting federal candidates in the narrow sense found to be constitutionally permissible in Buckley. "Buckley identified a single narrow exception to the rule that

limits on political activity were contrary to the First Amendment." Citizens Against Rent Control v. Berkeley, supra, 454 U.S. at 296-97 (emphasis added).

The "single narrow exception" recognized in Buckley was the danger of "actual or potential corruption." California Medical Association v. FEC, supra, 453 U.S. at 203 (Blackmun, J. concurring); Buckley, 424 U.S. at 26. While that danger was "sufficient to justify the regulation at issue" in NRWC, governing solicitation of contributions for the express partisan purpose of supporting candidates, it plainly has no application to political opinions on issues, and information about candidates' positions on those issues, proferred by nonpartisan advocacy organizations. Here, even more

so than in NCPAC, 105 S.Ct. at 1469, there is no danger of an advocacy organization's corrupting quid pro quo with a federal candidate:

> "The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by PACS [or, as in the present case, nonprofit incorporated advocacy groups] can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view....[H]ere, as in Buckley, the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as quid pro quo for improper commitments from the candidate. On this record, such an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more.

Id. at 1469. See also Buckley, 424 U.S. at 47.

Thus, unless the FEC has demonstrated that the speech at issue has the same

corrupting influence as do large political contributions to candidates' campaigns, the language of NRWC is inapplicable. Publicizing and rating candidates' votes and positions on major political issues tends to hold politicians accountable not for wrong or corrupt reasons but for precisely the right reasons, and not to individuals, businesses or unions pursuing their private interests, but to the electorate as a whole.

The other interest sometimes said to be served by §441b is protection of individuals "who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." NRWC, 459 U.S. at 208. That interest, however, has no relevance in

the case of a nonprofit advocacy organization whose sole purpose is to further stated political goals, and which is supported not by union dues or shareholder investment but by membership fees from individuals who expressly share those goals.

The Commission's attempt to invent a possible conflict between members or contributors and the ideological organizations which they support (FEC Brief at 31-33) deserves high marks for imagination but is entirely speculative as well as logically flawed. Inherent in any advocacy organization formed to amplify the political views of its members is a degree of delegation to the officers of the organization to decide exactly how these views should be amplified and therefore contributors' money should be spent. Members or

contributors may disagree with a particular tactical judgment of this type without having their wills overborne in the same sense that union members or shareholders do when their funds are misused for political purposes.

In the difficult area of campaign finance, the sometimes competing concerns for free expression and fair elections must be analyzed in each case to determine whether risks actually exist which justify infringement of constitutional rights. Where, as in the present action, the advocacy is issue-centered and not controlled by or connected to a candidate, no public interest is served by subjecting MCFL and similar organizations to prosecution, bans, civil penalties, or

government regulation so pervasive and intrusive that it will invade precious associational rights and in some instances silence speech entirely. On the contrary, this Court should recognize that grave and intolerable dangers to our democratic system inhere in the FEC's position that advocacy of the MCFL type may be prohibited unless organizations submit to a detailed and burdensome regulatory scheme.

CONCLUSION

For the foregoing reasons the FEC's reading of §441b should be rejected and

the judgment of the Court of Appeals affirmed.

Respectfully submitted,

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